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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

	)	2 CA-JV 2008-0129
	)	DEPARTMENT B
	)	
IN RE GUSTAVO S.	)	MEMORANDUM DECISION
	)	Not for Publication
	)	Rule 28, Rules of Civil
	)	Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. 17917201

Honorable Charles S. Sabalos, Judge

AFFIRMED IN PART; VACATED IN PART

Barbara LaWall, Pima County Attorney
By James M. Coughlin
Tucson
Attorneys for State

Robert J. Hirsh, Pima County Public Defender
By Susan C. L. Kelly
Tucson
Attorneys for Minor

E C K E R S T R O M, Presiding Judge.

¶1 After a contested hearing, the juvenile court adjudicated fifteen-year-old Gustavo S. delinquent, finding he had committed transportation of a narcotic drug for sale,

possession of a narcotic drug, and two counts of misdemeanor shoplifting.[1] The court ordered Gustavo committed to the Arizona Department of Juvenile Corrections for a term not to exceed his eighteenth birthday. On appeal, Gustavo argues the evidence was insufficient to establish his responsibility on the narcotics charges because the state failed to prove beyond a reasonable doubt that he had knowingly possessed or transported cocaine. For the reasons that follow, we conclude the evidence was sufficient to support the adjudication on the charges of transportation of a narcotic drug for sale and misdemeanor shoplifting. Because we conclude the court's additional determination of delinquency based on possession of a narcotic drug was constitutionally impermissible, we vacate that finding.

Background

¶2 After observing Gustavo shoplift a watch from a Tucson department store, a loss prevention officer for the store asked him to empty his pockets. When he complied, a small plastic bag dropped to the floor, and Gustavo immediately tried to retrieve it. Tucson police officer Cindy Mechtel arrived at the store and, upon learning that Gustavo's primary language appeared to be Spanish, requested the assistance of a Spanish-speaking officer.

¶3 Officer Fernando Badilla responded and, in Spanish, advised Gustavo of his rights pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966). Gustavo agreed to be

[1]The minute entries from the adjudication and disposition hearings erroneously report that, as to count one of the delinquency petition, the court found Gustavo responsible for possessing a narcotic drug for sale in violation of A.R.S. § 13-3408(A)(2). The record is clear, however, that the court found Gustavo responsible as charged for transportation of a narcotic drug for sale pursuant to § 13-3408(A)(7). By this decision, we correct what appears to have been a clerical error.

questioned, and Badilla asked him about the contents of the plastic bag, which Badilla described as pieces of an "off-white rock-looking substance" that he thought might be either crack cocaine or methamphetamine. According to Badilla, Gustavo told him a woman named Isabella had come to his house and asked him to meet a man in a red truck at a particular intersection, give the man $150 in exchange for "pastillas"—a word Badilla translated as "pills"—and return home, where Isabella was to meet him sometime later to pick up her purchase. He said Isabella had given him $200—$150 to pay for the pills and $50 for Gustavo to keep—but that he did not know what kind of pills he had purchased earlier that day. Badilla testified Gustavo had also said he had similarly acted as a paid go-between for Isabella on other occasions, by meeting the same man and giving him money for a package that Isabella would later retrieve from Gustavo's house.

¶4 Officer Mechtel testified that, when she opened the bag, she found eight smaller, individually wrapped packets. She unwrapped the packets and found that each contained one or two small, yellowish, irregularly shaped "rocks" resembling crack cocaine. Laboratory analysis admitted by stipulation established the bag contained approximately 1.75 grams of crack cocaine.

Insufficient Evidence

¶5 On appeal of an adjudication of delinquency, "we review the evidence and resolve all reasonable inferences in the light most favorable to upholding [the] judgment." *In re Jessi W.*, 214 Ariz. 334, ¶ 11, 152 P.3d 1217, 1219 (App. 2007). To determine whether the evidence is sufficient to support the adjudication, we consider only whether "a rational

trier of fact could have found the essential elements of the offense beyond a reasonable doubt," *In re Maricopa County Juv. Action No. JT9065297*, 181 Ariz. 69, 82, 887 P.2d 599, 612 (App. 1994), and we will not disturb the juvenile court's order unless "there is a complete absence of probative facts to support the judgment or if the judgment is contrary to any substantial evidence." *In re John M.*, 201 Ariz. 424, ¶ 7, 36 P.3d 772, 774 (App. 2001). Thus, to vacate a delinquency adjudication because of insufficient evidence, "it must clearly appear that upon no hypothesis whatever is there sufficient evidence to support the conclusion reached by the [court]." *State v. Arredondo*, 155 Ariz. 314, 316, 746 P.2d 484, 486 (1987).

¶6 We test the sufficiency of the evidence "against the statutorily required elements of the offense." *State v. Peña*, 209 Ariz. 503, ¶ 8, 104 P.3d 873, 875 (App. 2005). A person violates A.R.S. § 13-3408(A)(7) by knowingly transporting for sale, selling, or transferring a narcotic drug or offering to do so.[2] To establish that a person knowingly transported narcotics, the state must prove either "physical or constructive possession with actual knowledge of the presence of the narcotic substance." *Carroll v. State*, 90 Ariz. 411, 412, 368 P.2d 649, 650 (1962); *see also In re Maricopa County Juv. Action No. J-72773S*, 22 Ariz. App. 346, 348, 527 P.2d 305, 307 (1974).

¶7 Gustavo does not dispute the evidence establishes he physically possessed and transported a narcotic drug but argues the state failed to prove beyond a reasonable doubt that

[2]The statute in effect at the time Gustavo committed the crime is the same in relevant part; it can be found at 2005 Ariz. Sess. Laws, ch. 187, § 20.

he did so knowingly. He correctly asserts that, for the court to find that he violated either provision of § 13-3408, the state was required to prove he had known the package in his pocket contained a narcotic drug. *See State v. Diaz*, 166 Ariz. 442, 445, 803 P.2d 435, 438 (App. 1990), *vacated in part on other grounds*, 168 Ariz. 363, 813 P.2d 728 (1991) (error to instruct jury that defendant's knowledge of transporting "illegal substance" sufficient to convict under § 13-3408(A)(7)); *cf. State v. Norris*, No. 2 CA-CR 2006-0347, ¶ 8, 2009 WL 781767 (Ariz. Ct. App. Feb. 13, 2009) (under Arizona law, state must prove defendant knowingly possessed marijuana; evidence he knowingly possessed unspecified controlled substance not sufficient).

¶8 In *Diaz*, we stated that the knowledge required for a conviction under § 13-3408 may "be established either by direct or circumstantial evidence" a defendant knew a substance in his possession was a narcotic drug or "was aware of the high probability" it was and "acted with a conscious purpose to avoid learning" its true identity. 166 Ariz. at 445, 803 P.2d at 438. Although Gustavo acknowledges the state could rely on circumstantial evidence to prove he had knowingly transported the cocaine, he contends "[e]vidence of [his] knowledge [of] the contents of the package in this case is, at best, speculative," and "nothing presented at trial even approaches proof beyond a reasonable doubt that [he] knew or had reason to know that the items in the package . . . he picked up for Isabella were even illegal, let alone narcotic drugs." We disagree.

¶9 In arguing there was no evidence he "had ever looked inside the package to determine its true contents," Gustavo implies the state was required to disprove by direct

evidence his assertion he did not know the plastic bag contained cocaine. But, "[o]f necessity, proof of intent or knowledge must often be established by circumstantial evidence," *State v. Gaines*, 113 Ariz. 206, 208, 549 P.2d 574, 576 (1976), *overruled on other grounds by State v. Avila*, 127 Ariz. 21, 617 P.2d 1137 (1980), and the law does not require such evidence to disprove every hypothesis of innocence. *State v. Bullock*, 26 Ariz. App. 149, 153, 546 P.2d 1158, 1162 (1976). Moreover, the juvenile court was not required to believe Gustavo's self-serving statement. *Cf. State v. Barger*, 167 Ariz. 563, 566, 810 P.2d 191, 194 (App. 1990) (criminal defendant's "self-serving statements are 'highly suspect'" and properly excluded "absent circumstantial guarantees of trustworthiness"), *quoting State v. Smith*, 138 Ariz. 79, 84, 673 P.2d 17, 22 (1983).

¶10 As we find no merit to Gustavo's suggestion the state failed to produce evidence that was required, we similarly find no merit in his challenges to the evidence the state did present. Specifically, he disputes the credibility of Badilla's testimony that Gustavo had reported having had other similar transactions with Isabella because Badilla had not included this statement in his incident report. But nothing in the record suggests it would have been unreasonable for the trier of fact to have believed Badilla's testimony, notwithstanding Gustavo's attempts to impeach his credibility. It is not our role "to weigh the evidence and decide whether [we] would reach the same conclusion as the trier of fact" but to determine whether there was sufficient evidence to support the court's ruling, "resolv[ing] all reasonable inferences in favor of the State." *Gaines*, 113 Ariz. at 207-08, 539 P.2d at 575-76, *overruled on other grounds by Avila*.

¶11 The juvenile court's adjudication of delinquency rested on substantial evidence and reasonable inferences from that evidence. Indeed, the court reasonably could have inferred that Gustavo knowingly possessed the cocaine based only on the fact it was found in his pocket—that is, in his actual possession and under his exclusive control. *See*, *e.g.*, *State v. Teagle*, 217 Ariz. 17, ¶ 44, 170 P.3d 266, 277 (App. 2007) (discussing constructive possession; "jury may properly infer that a driver and sole occupant of a vehicle containing a large amount of drugs" had knowingly transported them); *Beijer v. Adams ex rel. County of Coconino*, 196 Ariz. 79, ¶ 25, 993 P.2d 1043, 1048 (App. 1999) ("[T]he presence of the drugs in the trunk of the car the Defendant was driving was sufficient, in and of itself, to support a conclusion beyond a reasonable doubt that he was knowingly transporting the drugs."). Additional support for the inference Gustavo knowingly possessed a narcotic substance included his immediate reaction when the plastic bag fell from his pocket, his purchase of the drugs from a vehicle on the street, the payment he received for making that purchase, the irregular shape of the crack cocaine rocks and the manner of their packaging, and his statement he had previously performed similar errands for Isabella. We find the evidence was sufficient to support the court's finding that Gustavo had knowingly transported narcotic drugs.

Double Jeopardy

¶12 We also consider whether the juvenile court's findings that Gustavo had committed both transportation of a narcotic drug for sale, *see* § 13-3408(A)(7), and possession of a narcotic drug, *see* § 13-3408(A)(1), violate double jeopardy principles. We

review de novo whether a prosecution, conviction, or sentence violates the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution. *State v. McGill*, 213 Ariz. 147, ¶ 21, 140 P.3d 930, 936 (2006). Although neither party raised the issue on appeal and Gustavo's counsel did not object to the court's findings below, a violation of a defendant's right against double jeopardy constitutes fundamental error, *id.*, and "we will not ignore [fundamental error] when we find it," even absent a request for review. *State v. Fernandez*, 216 Ariz. 545, ¶ 32, 169 P.3d 641, 650 (App. 2007).

¶13 At Gustavo's adjudication hearing, the juvenile court expressed concern about a possible double jeopardy violation, asking counsel whether the narcotics charges had merged in light of our supreme court's holding that possession of a dangerous drug, *see* A.R.S. § 13-3407(A)(1), is a lesser-included offense of transporting a dangerous drug for sale, *see* § 13-3407(A)(7). *See State v. Cheramie*, 218 Ariz. 447, ¶ 22, 189 P.3d 374, 378 (2008). Gustavo's counsel agreed with the court that the narcotics charges were based on the same offense but stated that finding Gustavo responsible on all counts of the delinquency petition would have little consequence, as it would not affect either the court's broad discretion at disposition or any future disposition or sentence Gustavo might receive as a repeat offender. *See* A.R.S. § 13-501 (juvenile subject to adult prosecution as "chronic felony offender" after "two prior and separate adjudications and dispositions" for specified conduct).

¶14 But this court has held that, "when a defendant is *convicted* more than once for the same offense, his double jeopardy rights are violated even when . . . he receives

concurrent sentences." *State v. Brown*, 217 Ariz. 617, ¶ 13, 177 P.3d 878, 882 (App. 2008). As we noted in *Brown*, "'The separate *conviction*, apart from the concurrent sentence, has potential adverse collateral consequences that may not be ignored . . . [including] the societal stigma accompanying any criminal conviction. Thus, the second conviction, even if it results in no greater sentence, is an impermissible punishment.'" *Id.*, *quoting Ball v. United States*, 470 U.S. 856, 865 (1985).[3] We conclude the same reasoning applies in a delinquency proceeding, "whose object is to determine whether [a juvenile] has committed acts that violate a criminal law and whose potential consequences include . . . the stigma inherent in such determination." *Breed v. Jones*, 421 U.S. 519, 529, 541 (1975) (protection from double jeopardy applicable to juveniles).

¶15 Based on *Cheramie*, 218 Ariz. 447, ¶ 22, 189 P.3d at 378, and *Brown*, 217 Ariz. 617, ¶ 13, 177 P.3d at 882, we conclude the juvenile court's order finding Gustavo responsible for both possessing a narcotic drug and transporting it for sale, constitutes double jeopardy and is impermissible. *Cf. State v. Ortega*, 541 Ariz. Adv. Rep. 3, ¶ 9 (Ct. App. Oct. 14, 2008) ("[A] defendant may not be convicted for both an offense and its lesser included offense, because they are considered the 'same offense' for double jeopardy purposes."), *quoting Lemke v. Rayes*, 213 Ariz. 232, ¶ 16, 141 P.3d 407, 413 (App. 2006). We therefore

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[3]In *Ball*, the Supreme Court concluded federal convictions for both "receipt" and "possession" of a firearm, based on a single act, constituted double jeopardy because proof of receipt "necessarily" included proof of possession. 470 U.S. at 862. The Court held, "One of the convictions, as well as its concurrent sentence, is unauthorized punishment for a separate offense." *Id*. at 864; *see also Rutledge v. United States*, 517 U.S. 292, 307 (1996) (citing *Ball* with approval).

vacate the court's finding that Gustavo was responsible for possessing a narcotic drug in violation of § 13-3408(A)(1).

Conclusion

¶16 For the foregoing reasons, although we vacate that portion of the juvenile court's order finding Gustavo responsible for possessing a narcotic drug, we otherwise affirm the adjudication of delinquency based on his transportation of a narcotic drug for sale and misdemeanor shoplifting. *See State v. Chabolla-Hinojosa*, 192 Ariz. 360, ¶ 21, 965 P.2d 94, 99 (App. 1998) (vacating lesser offense when conviction of lesser-included offense violates double jeopardy). Because "the record clearly shows the . . . court would have reached the same result" at disposition without consideration of the separate possession charge, we also affirm the court's disposition order. *State v. Ojeda*, 159 Ariz. 560, 562, 769 P.2d 1006, 1008 (1989).

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PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

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J. WILLIAM BRAMMER, JR., Judge

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GARYE L. VÁSQUEZ, Judge